

James R. Condo (#005867)
SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, AZ 85004-2204
Telephone: (602) 382-6000
jcondo@swlaw.com

Richard B. North, Jr. (admitted *pro hac vice*)
Georgia Bar No. 545599
Matthew B. Lerner (admitted *pro hac vice*)
Georgia Bar No. 446986
NELSON MULLINS RILEY & SCARBOROUGH LLP
Atlantic Station
201 17th Street, NW, Suite 1700
Atlanta, GA 30363
Telephone: (404) 322-6000
richard.north@nelsonmullins.com
matthew.lerner@nelsonmullins.com

Attorneys for Defendants
C. R. Bard, Inc. and
Bard Peripheral Vascular, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

IN RE: Bard IVC Filters Products Liability
Litigation,

No. 2:15-MD-02641-DGC

**DEFENDANTS' MOTION TO
BIFURCATE TRIAL**

This Document Relates to:

(Assigned to the Honorable David G.
Campbell)

Lisa Hyde, et al. v. C. R. Bard, Inc., et al.
CV-16-00893-PHX-DGC

Pursuant to Fed. R. Civ. P. 42(b), Defendants C. R. Bard, Inc. and Bard Peripheral Vascular, Inc. (collectively “Bard”) move to bifurcate the trial of this case to avoid prejudice. Specifically, Bard requests this Court conduct trial in two phases as the Court conducted trial in the *Booker* and *Jones* trials: determining liability, compensatory damages, and whether punitive damages should be awarded in the first phase of trial and, if necessary, determining the amount of punitive damages in the second phase.

I. Factual Background

This is a product liability action in which the plaintiffs assert that Ms. Lisa Hyde suffered personal injuries arising out of the implantation of a Bard IVC Filter (“Filter”).¹ The Filter at issue was designed and sold by Bard Peripheral Vascular, Inc., a division of Bard, headquartered in Arizona. The plaintiffs allege that they are entitled to recover punitive damages against Bard – which Bard denies. In light of the plaintiffs’ claim for punitive damages, the trial of this claim should be bifurcated from the issues of liability and compensatory damages², in order to avoid prejudice.

II. Legal Standard

Bifurcation is a matter of procedure and, thus, the Federal Rules govern a bifurcation decision in diversity cases. *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 283 (2d Cir. 1990) (holding bifurcation is procedural and applying federal rules); *Rosales v. Honda Motor Co.*, 726 F.2d 259, 262 (5th Cir. 1984) (upholding bifurcation under federal rules); *Moss v. Associated Transp., Inc.*, 344 F.2d 23, 24 (6th Cir. 1965) (upholding bifurcation under federal rules).

Under the Federal Rules of Civil Procedure, bifurcation is governed by Rule 42(b), which allows federal courts discretion to order bifurcation of issues “[f]or convenience, to avoid prejudice, or to expedite and economize[.]” Fed. R. Civ. P. 42(b). In particular, Rule 42(b) provides courts with clear authority to separate trials into liability and damage

¹ The issue of whether the filter implanted in Ms. Hyde was a G2®X or an Eclipse® is being addressed in a separate submission.

² The Court has previously ruled that Wisconsin law applies to the plaintiffs’ substantive claims against Bard. *See* July 26, 2018 Order [Doc. 12007].

phases. *See Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 603–04 (9th Cir. 2016), *cert. denied sub nom. City of Anaheim, Cal. v. Estate of Diaz*, 137 S. Ct. 2098, 197 L. Ed. 2d 895 (2017) *citing* 9A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2390 (3d ed. 2016) (“The separation of issues of liability from those relating to damages is an obvious use for Federal Rule 42(b).”); *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116 (9th Cir. 1994) (noting that trial was bifurcated so that liability issue could be determined first, and second trial for damages would be held “if needed”).

III. Argument

Bifurcation of trial is necessary to avoid introduction of prejudicial evidence during the determination of liability and compensatory damages.

The Ninth Circuit has observed that the most common reason for bifurcating is to exclude evidence of the defendant's wealth or net worth from the compensatory damages phase. *In re Hawaii Fed. Asbestos Cases*, 960 F.2d 152 (9th Cir. 1992). Evidence of a defendant's financial net worth is admissible and relevant for the purpose of evaluating the amount of punitive damages to be awarded. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981); *United States v. Big D Enterprises, Inc.*, 184 F.3d 924, 932 (8th Cir.1999). However, courts have widely recognized that such evidence is wholly irrelevant to liability or compensatory damages, and can be highly prejudicial to the jury's determination on those issues. *See Parsons v. First Investors Corp.*, 122 F.3d 525, 529 (8th Cir.1997) (recognizing that bifurcation of trial into separate phases to consider, first, liability and compensatory damages, and second, punitive damages, can avoid the potential that evidence pertinent to punitive damages will improperly prejudice a determination on liability and compensatory damages); *State Farm Fire & Cas. Co. v. Woods*, 896 F. Supp. 658, 660 (E.D. Tex. 1995) (ordering bifurcation and holding that “[w]hile [defendant's] net worth will be relevant to a determination of punitive damages, that same information could severely prejudice the [defendant] in the calculation of actual damages.”). Bifurcation of a punitive damage claim from other triable issues is the “preferred method” of preventing prejudice against

the defendant due to litigation of its financial condition. *Smith v. Lightning Bolt Prods., Inc.*, 861 F.2d 363, 373–74 (2d Cir. 1988) (“the preferred method of accommodating the various interests is to delay trial as to the amount of an award of punitive damages until the usual issues of liability and compensatory damages have been tried, along with the matter of whether the defendant's conduct warrants any award of punitive damages at all.”)³

Here, evidence relevant only to the amount of punitive damages – such as Bard’s financial net worth – carries the same potential for severe prejudice recognized by other courts. Limiting instructions are also ineffective at curtailing the potential prejudice inherent in trials involving punitive damages claims. *See Estate of Diaz*, 840 F.3d at 603–04 (9th Cir. 2016) (reversing district court’s denial of bifurcation of punitive damages claim and noting that “if a limiting instruction was considered sufficient to cure all prejudice, there would be no need ever to bifurcate to avoid prejudice”). Bifurcation of the proceedings under Fed. R. Civ. P. 42(b), however, provides a solution for both problems. On the one hand, bifurcation protects against prejudice by excluding the offending evidence during the first phase of trial. And, on the other hand, it allows the appropriate introduction of relevant evidence during the second phase.

³ Federal courts sitting in diversity often consider the relevant state law regarding bifurcation of the punitive damages claims from other triable issues if there is no conflict with Rule 42(b). *In re USA Commercial Mortg. Co.*, No. 2:07-CV-00892-RCJ, 2010 WL 4702341, at *2 (D. Nev. Nov. 12, 2010); *Cuc Dang v. Sutter's Place, Inc.*, No. C-10-02181 RMW, 2012 WL 6203203, at *4 (N.D. Cal. Dec. 12, 2012); *Allied Serv. Corp. v. WG Warranty & Ins. Serv.*, No. CIV.A. 3:93-CV-0411-, 1996 WL 33417524, at *1 (N.D. Tex. Mar. 7, 1996); *In re Mentor Corp. ObTape Transobturator Sling Prod. Liab. Litig.*, No. 3:07-CV-00101, 2010 WL 1998166, at *4 (M.D. Ga. May 18, 2010) (“Pretermittting whether this issue [of bifurcation] is procedural or substantive and thus governed by federal or Georgia law, the Court finds Georgia law on the issue instructive.”) In Wisconsin, section 805.05(2) of the Wisconsin Statute allows for bifurcation of any claim if separate trials will “avoid prejudice.” Wis. Stat. § 805.05(2). Wisconsin courts have consistently applied section 805.05(2) to prevent the introduction of prejudicial evidence into the liability and compensatory damages stage of trial. *See, e.g., Strenke v. Hogner*, No. 03-2527, 2004 WL 1097753, at *4 (Wis. Ct. App. May 18, 2004) (affirming trial court’s bifurcation of compensatory damages from punitive damages where evidence of defendant’s intoxication, for which defendant already conceded liability, was highly prejudicial and not relevant to compensatory damages claim); *Russell v. Wisconsin Mut. Ins. Co.*, 214 Wis. 2d 591, 571 N.W.2d 924 (Ct. App. 1997) (same).

1 Bifurcating the issues of liability and compensatory damages from the issue of
 2 punitive damages strikes the appropriate balance between exclusion of prejudicial
 3 evidence and admission of relevant evidence pertinent to the issue of the amount of
 4 punitive damages, if any, to be awarded. Indeed, Bard is simply requesting that the Court
 5 adopt the same bifurcation procedure here as it did during the *Jones* and *Booker*
 6 bellwether trials -- the jury will determine liability, compensatory damages, and the
 7 availability of punitive damages in the initial phase of trial and, should the jury find that
 8 punitive damages should be awarded, the second phase of trial will immediately
 9 commence so that the jury can determine the amount of punitive damages to award. Thus,
 10 in order to avoid severe prejudice through the admission of net worth or other evidence
 11 during the determination of liability and compensatory damages, the trial of this case
 12 should be bifurcated in accordance with Rule 42(b).

13 **IV. Conclusion**

14 For the foregoing reasons, the trial of this case should be bifurcated in accordance
 15 with the Rule 42(b).

16 RESPECTFULLY SUBMITTED this 10th day of August, 2018.

17 s/Richard B. North, Jr.
 18 Richard B. North, Jr.
 19 Georgia Bar No. 545599
 20 Matthew B. Lerner
 21 Georgia Bar No. 446986
 22 NELSON MULLINS RILEY & SCARBOROUGH, LLP
 23 Atlantic Station
 24 201 17th Street, NW / Suite 1700
 25 Atlanta, GA 30363
 26 PH: (404) 322-6000
 27 FX: (404) 322-6050
 28 richard.north@nelsonmullins.com
 matthew.lerner@nelsonmullins.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

James R. Condo (#005867)
SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren
Phoenix, AZ 85004-2204
PH: (602) 382-6000
jcondo@swlaw.com

**Attorneys for Defendants C. R. Bard, Inc. and
Bard Peripheral Vascular, Inc.**

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2018, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all attorneys of record.

s/Richard B. North, Jr.
Richard B. North, Jr.

Nelson Mullins Riley & Scarborough

L.L.P.
201 17th Street NW, Suite 1700
Atlanta, GA 30363
(404) 322-6000